

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ROBERT MANIZAK,

Defendant-Appellant

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UNPUBLISHED

May 27, 2014

No. 314541

Wayne Circuit Court

LC No. 12-001699-FH

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals from his jury trial convictions of receiving or concealing a stolen motor vehicle, MCL 750.535(7), driving with a suspended license, second offense, MCL 257.904(3)(b), and failing to stop at the scene of an accident, MCL 257.620. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to four to 20 years in prison for receiving or concealing a motor vehicle, one year in jail for driving with a suspended license, and 93 days in jail for failing to stop at the scene of an accident. For the reasons set forth below, we affirm.

**I. FACTS**

Defendant's convictions and sentences arise out of a motor vehicle accident. During the afternoon of October 11, 2011, Walter Claydon was stopped at an intersection in Canton waiting to make a left-hand turn. While he was stopped, a 2010 Ford Fusion struck Claydon's truck from behind. The parties stipulated that the Fusion was stolen one week earlier.

After the impact, Claydon exited his vehicle to see if the other driver was injured. Defendant exited the Fusion. Claydon observed defendant from a distance of approximately four feet, with the two standing face-to-face. After Claydon asked defendant if he was injured, defendant walked to the sidewalk and then ran down the sidewalk, heading north toward a clump of trees. Claydon witnessed defendant removing clothing as he ran. Claydon waited for police to arrive and provided a description of defendant to a responding officer. According to Claydon, defendant was wearing black shorts with a white stripe and a yellow t-shirt. A report of the accident was broadcast from police dispatch, which described defendant as a bald white male, age 30 to 35, wearing a yellow t-shirt and black shorts with a white stripe.

Officers Eric Kolke and Jessica Nuotilla canvassed the area north of the accident scene. Nuotilla heard movement in a wooded area and asked Kolke to assist her search. Kolke

observed a man exit the wooded area. This man was bald, shirtless, and wearing black shorts with a white stripe. Kolke described the man as sweating heavily and covered in scratches. Kolke ordered the man to the ground and handcuffed him. At trial, Kolke identified defendant as the man he apprehended.

Nuotilla arrived at the accident scene shortly thereafter and after searching defendant, Kolke and Nuotilla placed defendant in the rear seat of Nuotilla's police vehicle. At some point during this time, Nuotilla noticed a cell phone lying in the parking lot. Defendant alternately claimed and disclaimed ownership of the cell phone. In an effort to discover the cell phone's owner, Nuotilla used it to call 911, hoping that the operator would be able to identify the owner using caller ID. However, the 911 operator was unable to do so. The officers asked defendant his name and defendant responded by stating that his name was "Death."

## II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence presented at trial was insufficient to convict him of receiving or concealing a stolen motor vehicle.<sup>1</sup>

In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the trier of fact's verdict. [*People v Strickland*, 293 Mich App 393, 399; 810 NW2d 660 (2011) (quotation marks and brackets omitted).]

Defendant argues that insufficient evidence was presented to identify him as the driver of the Fusion. Identity is an element of every offense, which the prosecutor must prove beyond a reasonable doubt at trial. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). As defendant acknowledges in his brief on appeal, Claydon unequivocally identified defendant as the individual who was driving the Fusion, going so far as to say that he had "no question in [his] mind" that defendant was the other driver. At the scene, Claydon provided police with a description of a man wearing striped shorts and a yellow t-shirt, who fled the accident on foot heading north towards a wooded area, and removing his clothes as he ran. Kolke testified that he observed and apprehended a man matching the visual description of the fleeing driver, who emerged from a wooded area north of the accident scene, and who was shirtless, sweating, and covered in scratches. From this evidence, a rational juror could reasonably conclude that defendant was the driver of the Fusion. Thus, sufficient evidence was presented to identify defendant as the driver of the Fusion.

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<sup>1</sup> Whether a defendant's conviction was supported by sufficient evidence is reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

Defendant also contests whether, due to Claydon's inability to recall how many times he had previously appeared to testify in the case, Claydon was a credible witness. It is true that Claydon testified that he had only given testimony in this case on one prior occasion and that, through hearing transcripts, it was established that Claydon had actually testified on two separate dates. However, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant further argues that the evidence was insufficient to demonstrate that he had knowledge that the Fusion was stolen and, thus, was insufficient to sustain a conviction under the receiving or concealing stolen property statute, MCL 750.535. As MCL 750.535(7) provides that "[a] person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing, or having reason to know or reason to believe, that the motor vehicle is stolen, embezzled, or converted." Thus, to sustain defendant's conviction under this statute, the prosecutor was required to prove that defendant knew or had reason to believe that the vehicle was stolen. MCL 750.535(7); *People v Allay*, 171 Mich App 602, 608; 430 NW2d 794 (1988). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Kanaan*, 278 Mich App at 622.

As we stated in *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995) (citations omitted; emphasis supplied):

It is well established in Michigan law that evidence of flight is admissible. *Such evidence is probative because it may indicate consciousness of guilt*, although evidence of flight by itself is insufficient to sustain a conviction. The term "flight" has been applied to such actions as fleeing the scene of a crime, leaving the jurisdiction, running from police, resisting arrest, and attempting to escape custody.

The evidence admitted at trial established that defendant was driving a stolen vehicle and that after the accident, he fled the scene. Defendant was also observed removing his clothing, an act that could reasonably be construed as an attempt to conceal his identity. That defendant was driving a stolen vehicle, fled the accident scene, and attempted to conceal his identity was evidence of his consciousness of guilt, i.e., defendant's knowledge that he was driving a stolen vehicle. See *Coleman*, 201 Mich App at 4. Although circumstantial, this evidence was sufficient to allow a rational juror to conclude that defendant knew he was in possession of a stolen vehicle.

Defendant argues that his flight may be sufficient to demonstrate knowledge that he was driving with a suspended license, but that his flight cannot demonstrate knowledge that the vehicle was stolen. We find no logical reason to make this distinction. As discussed, the jury was free to infer from defendant's conduct that he was aware that the vehicle was stolen. Accordingly, sufficient evidence was presented to convict defendant of receiving or concealing a motor vehicle.

### III. WARRANTLESS ARREST

Defendant argues that his arrest was invalid.<sup>2</sup> To make a valid warrantless arrest, a police officer must have probable cause to believe that a felony was committed and that the suspect was the individual committed the crime. *People v Cohen*, 294 Mich App 70, 74-75; 816 NW2d 474 (2011). “Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Id.* at 75, quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). “This probable cause standard is a practical, nontechnical conception judged from the totality of the circumstances before the arresting officers.” *Id.*, citing *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003) (quotation marks omitted).

Defendant’s argument focuses on whether the arresting officer had probable cause to identify him as the driver of the Fusion. Here, police dispatch provided Kolke with a description of a white, bald-headed man wearing black shorts with a white stripe and a yellow t-shirt. Kolke was told that the man was seen taking off his clothing as he ran. Kolke was also informed that the man was last seen running north from the scene of the accident. Kolke then observed a white, bald-headed man, wearing black shorts with a white stripe and no shirt, exiting a wooded area to the north of the accident scene a short time after the accident. According to Kolke, the man was sweating and covered in scratches. Based on the information Kolke had been provided, he had far more than the information necessary to reasonably believe that the man he arrested, defendant, was the driver of the Fusion. Accordingly, the arrest was valid.

### IV. WARRANTLESS SEARCH AND SEIZURE

Defendant next argues that Nuotilla’s possession and use of the cell phone constituted an unreasonable search and seizure in violation of defendant’s constitutional rights.

Defendant waived this issue. If an illegal search had taken place, the appropriate remedy would have been to exclude use of that evidence at trial. *People v Barbarich (On Remand)*, 291 Mich App 468, 473; 807 NW2d 56 (2011). At trial, the prosecutor did not question Nuotilla regarding the cell phone. Defendant, however, questioned Nuotilla on cross-examination regarding the cell phone and her subsequent attempt to discover who owned the phone. By introducing this evidence himself, defendant waived any claim regarding the cell phone. Waiver is the “intentional relinquishment or abandonment of a known right.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). “[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.” *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). Any potential prejudice resulting from evidence regarding the cell phone was caused by defendant and, thus, defendant cannot now raise a claim of error regarding the introduction of this testimony.

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<sup>2</sup> Preserved claims of constitutional error are reviewed de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Even had defendant not waived the issue, he would not be entitled to relief. As we stated in *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008) (quotations and citations omitted):

US Const, Am IV, and Const 1963, art 1, § 11, guarantee the right of the people to be free from unreasonable searches and seizures. However, this right is personal and may not be invoked by third parties. For an individual to assert standing to challenge a search, the individual must have had a legitimate expectation of privacy in the place or location searched, which expectation society recognizes as reasonable. The defendant has the burden of establishing standing, and in deciding the issue, the court should consider the totality of the circumstances. Factors relevant to the determination of standing include ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Here, Nuotilla testified that the phone was found in the parking lot, that defendant alternatively claimed and disclaimed ownership of the cell phone, and that she was unable to ascertain the cell phone's true owner. Although defendant now claims that the phone was his and was taken from his person, the record does not support these factual assertions, and he points to no evidence beside his current contention that such is the case. Thus, there is no evidence in the record that would establish that the cell phone was taken from defendant's person or that defendant had any interest whatsoever in the cell phone. As defendant cannot establish that he had any interest or expectation of privacy in the cell phone, he lacks standing to challenge any search and seizure of the cell phone.

To the extent defendant argues that Nuotilla's call to 911 violated the federal and Michigan wire-tapping statutes, he provides no substantive discussion of his argument, and has abandoned the issue on appeal. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotation marks, brackets, and citations omitted). "Such cursory treatment constitutes abandonment of the issue." *Id.* Accordingly, defendant has abandoned any claim that Nuotilla's actions violated the federal and Michigan wire-tapping statutes, and we decline consider the claim.

## V. UNLAWFUL INTERROGATION

Defendant next argues that his right against self-incrimination was violated when police unlawfully interrogated him in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).<sup>3</sup>

Defendant argues that the police committed an unlawful interrogation by asking him his name without first obtaining a waiver of his *Miranda* rights. However, questions regarding a suspect's name "fall outside the protections of *Miranda* and the answers need not be suppressed" because these questions fall under the "routine booking information" exception to *Miranda* protections. *Pennsylvania v Muniz*, 496 US 582, 601-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990); *People v O'Brien*, 113 Mich App 183, 197; 317 NW2d 570 (1982). Accordingly, the police did not violate defendant's *Miranda* rights by asking him his name and it was not error to admit defendant's response at trial.

## VI. IDENTIFICATION PROCEDURES AS A PROBABLE CAUSE REQUIREMENT

In defendant's next two issues, he argues that due process requires police to use on-scene identification procedures and a lineup prior to his arrest in order to establish probable cause to believe that he was the driver of the Fusion.<sup>4</sup>

Defendant cites no authority requiring the use of on-site identification procedures or pre-arrest lineup procedures to satisfy due process as to probable cause. Although on-scene identification procedures are a reasonable police practice to aid in identifying a suspect, see *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997), we have found no authority of any sort that requires the use of lineup procedures to establish identity prior to arrest. Before arresting defendant, police only needed probable cause to believe that defendant was the driver of the Fusion. *Cohen*, 294 Mich App at 74-75. As discussed in Issue III, Kolke had more than sufficient facts to establish probable cause to believe that defendant was the driver of the Fusion. Thus, despite not utilizing on-scene identification procedures or a lineup, defendant's arrest was valid.

## VII. INVALIDITY OF THE ARREST WARRANT

Defendant next argues that an arrest warrant, issued two days after his arrest, was invalid.<sup>5</sup> Defendant asserts that the trial court never obtained jurisdiction over him because he believes his arrest and subsequent arrest warrant was invalid. MCR 6.104(D) provides:

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<sup>3</sup> Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>4</sup> Preserved claims of constitutional error are reviewed de novo. *Pipes*, 475 Mich at 274.

<sup>5</sup> Preserved claims of constitutional error are reviewed de novo. *Pipes*, 475 Mich at 274.

If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment. On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c. Arraignment of the accused may then proceed in accordance with [MCR 6.104](E).

Defendant was arrested without a warrant on October 11, 2011. A complaint was filed on October 13, 2011 and the trial court issued a warrant the same day. Defendant now challenges the adequacy of this arrest warrant. Even assuming the warrant was defective, “[b]ecause an arrest warrant is not required, when an invalid arrest warrant is obtained, the question becomes whether the officer had probable cause to arrest.” *People v Mayberry*, 52 Mich App 450, 451; 217 NW2d 420 (1974). As discussed in Issue III, the police had probable cause arrest defendant. Accordingly, regardless of whether the later arrest warrant was invalid, defendant’s arrest was supported by probable cause, and his contention is without merit.

Further, even if defendant’s arrest was invalid, he is not entitled to relief. “A court’s jurisdiction to try an accused person cannot be challenged on the ground that physical custody of the accused was obtained in an unlawful manner.” *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974). Rather, the sole sanction imposed for the invalidity of an arrest warrant is suppression of evidence obtained from the person following his arrest. *Id.* Accordingly, even if the arrest warrant were deemed defective, the trial court would not be deprived of jurisdiction over defendant.

### VIII. BRADY VIOLATION

Defendant next argues that the prosecutor withheld favorable evidence from him, in violation of *Brady v Maryland*, 373 US 83, 84-86; 83 S Ct 1194; 10 L Ed 2d 215 (1963).<sup>6</sup>

Criminal defendants have the right to obtain favorable evidence from the prosecution. *Id.* at 87. “[T]he components of a ‘true *Brady* violation,’ are that (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material.” *People v Chenault*, 495 Mich 142, \_\_ ; \_\_ NW2d \_\_ (2014), slip op at 5.

To establish his claim, defendant relies upon what transpired at his preliminary examination. During the first day of defendant’s preliminary examination, the prosecutor presented Claydon as a witness. On redirect examination, Claydon testified that he remembered providing police officers with a description of defendant, including a description of defendant’s hair and head. The prosecutor sought to provide Claydon with a copy of the police report to refresh his memory of the description he provided. The trial court refused to allow the prosecutor to present Claydon with this report, as Claydon had not testified that he lacked memory of his description. The prosecutor attempted to approach the witness with the police report, and the following exchange occurred:

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<sup>6</sup> Preserved claims of constitutional error are reviewed de novo. *Pipes*, 475 Mich at 274.

*Defense Counsel:* For what, are we impeaching him or are you trying to refresh his recollection?

*The Court:* What are—what are we looking at here?

*The Prosecutor:* Well—

*The Court:* Did you make a handwritten statement to the police at some point?

*The Prosecutor:* He did not.

*Claydon:* No, I did not.

*The Court:* Okay, so, it is somebody else's report that was taken from whatever he told the officer?

*The Prosecutor:* Well, Your Honor, well—

*The Court:* That is always a little questionable for using to refresh somebody's memory.

*The Prosecutor:* And, Your Honor, dispatch—we are trying to retrieve something at the moment that may assist us in this—if we could just have about a couple of minutes?

*The Court:* Sure, we can do that.

After a recess, the court was forced to adjourn the examination so that defendant could be referred for a competency examination and no further questioning of Claydon took place that day. When Claydon was eventually recalled to testify, no documents were provided to refresh his memory or were admitted as evidence.

Defendant's argument is without merit. The exchange above does not indicate that the prosecutor withheld any favorable evidence from defendant. Rather, the court was attempting to ensure that the police report was not used for any improper evidentiary purpose. Defendant simply misunderstands or mischaracterizes what occurred. Further, although defendant asserts that the prosecutor withheld evidence of an illegal arrest and of an illegal search, defendant does not identify what evidence he believes was withheld. Accordingly, defendant cannot establish any of the *Brady* prongs, as each prong presumes the existence of some form of evidence.

## IX. CORPOREAL LINEUP AT DEFENDANT’S PRELIMINARY EXAMINATION

Defendant argues that the trial court abused its discretion when it refused to order that a corporeal lineup take place prior to defendant’s preliminary examination, thereby denying defendant due process of law.<sup>7</sup>

The essence of defendant’s argument is that due process required that Claydon identify defendant in a lineup before he could be bound over for trial. Defendant points to no authority stating such a rule. At the preliminary examination, the prosecutor was only required to present evidence sufficient to establish probable cause to believe that a felony was committed and that defendant was the individual who committed it. *Yost*, 468 Mich at 125-126. At the preliminary examination, Claydon identified defendant as the driver of the Fusion and testified that defendant, after striking Claydon’s vehicle, fled the accident scene. The parties stipulated that the Fusion was a stolen vehicle. From this testimony, the trial court could permissibly conclude that probable cause existed to believe that defendant was the individual who committed a felony, i.e., receiving or concealing a stolen vehicle.

## X. MOTIONS

Defendant next argues that his due process rights were infringed when the trial court failed to address a motion in a timely manner and denied two oral motions for an evidentiary hearing.<sup>8</sup>

Regarding the delay in hearing defendant’s motion, defendant waived any potential claim of error. After defendant discussed the delay in hearing his motions with the trial court, the trial court stated that it would “set a motion date. And on that motion date, we’re going to he[ar] all of your outstanding motions.” The trial court set a date of October 11, 2012 and asked defendant if that date was acceptable to him. Defendant responded by stating, “[w]hatever is good for your schedule, Your Honor.” Although the motions were not actually heard until October 26, 2012, the trial court indicated that the delay was caused by defendant’s refusal to attend the scheduled hearing. The record shows that defendant accepted the trial court’s decision to hear the motions at a later date and that defendant himself was responsible for any further delay in hearing the motions. Thus, defendant has waived any challenge to the delay in hearing his motions. See *Carter*, 462 Mich at 215 (waiver is the “intentional relinquishment or abandonment of a known right.”); *Griffin*, 235 Mich App at 46 (“[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.”).

Defendant also argues that the trial court abused its discretion by denying two oral motions for an evidentiary hearing. However, defendant does not address the merits of his

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<sup>7</sup> Preserved claims of constitutional error are reviewed de novo. *Pipes*, 475 Mich at 274. To the extent defendant challenges the magistrate’s bindover decision, we review the magistrate’s decision for an abuse of discretion. *Yost*, 468 Mich at 126-127.

<sup>8</sup> Preserved claims of constitutional error are reviewed de novo. *Pipes*, 475 Mich at 274.

contention. Defendant does not cite where in the record he requested an evidentiary hearing, cites no authority explaining why he was entitled to an evidentiary hearing, and does not explain what purpose an evidentiary hearing would have served. We have reviewed the record and have not found any such motions for an evidentiary hearing and, thus, defendant is not entitled to relief.

## XI. CUMULATIVE ERROR

Defendant next argues that the cumulative effect of his asserted errors deprived him of a fair trial. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal.” *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, only actual errors may be cumulated in order to establish that their combined effect deprived a defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). As discussed above, defendant has not demonstrated that any error occurred. Accordingly, he cannot demonstrate that the cumulative effect of his asserted errors denied him a fair trial.

## XII. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his preliminary examination counsel and trial counsel were constitutionally ineffective.<sup>9</sup>

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). “Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise.” *Swain*, 288 Mich App at 643. “To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below objective standards of reasonableness and that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.” *Id.* “A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel’s tactics constituted sound trial strategy.” *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

On appeal, defendant does not explain why his attorney’s conduct was objectively unreasonable or did not amount to sound strategy. Defendant argues that his preliminary examination counsel was ineffective for failing to adequately question and impeach Claydon as a witness. However, how best to cross-examine and impeach a witness are matters of trial strategy, *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987), and “[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy[.]” *People v*

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<sup>9</sup> “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *LeBlanc*, 465 Mich at 579. “Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo.” *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

*Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Further, the record demonstrates that counsel thoroughly cross-examined Claydon regarding his ability to observe and identify defendant as the driver of the Fusion.

Defendant next argues that counsel was ineffective for moving forward with the preliminary examination without a copy of defendant's arrest warrant. Based on defendant's prior arguments, defendant likely believes that had counsel possessed this warrant, she would have been aware of its alleged deficiencies and would have challenged the validity of defendant's arrest. However, as has been discussed in Issue VII, even if the warrant itself was somehow defective, defendant's arrest was valid because it was premised upon probable cause. Thus, any motion challenging the arrest would have been futile and counsel is not ineffective for failing to pursue a futile motion. *People v Horn*, 279 Mich App 31, 42 n 5; 755 NW2d 212 (2008).

Defendant next asserts that his preliminary examination counsel never spoke with him. However, this assertion is factually unsupported. At the preliminary examination, counsel stated that she met with defendant that day. Counsel also pursued a request for a lineup, a lineup that she stated "[defendant] would like to have happen." Thus, the record indicates that counsel not only met with defendant, but that defendant made a specific request to counsel, which she then pursued on his behalf. Defendant's contention that his preliminary examination counsel never spoke to him is without factual support.

Finally, defendant argues that trial counsel was ineffective for arguing that the key question at trial was whether defendant had knowledge that the Fusion was stolen. Defendant has provided no reason to believe that this strategy was unsound, as there was overwhelming evidence that defendant was the driver of the Fusion and had fled the accident scene, and it was stipulated that the vehicle was stolen and that defendant's license had been revoked. Although defendant infers that this argument conceded that defendant was, in fact, the driver of the Fusion, the record shows that defense counsel also argued that the evidence was not sufficient to identify defendant as the driver and that the jury should only address the question of knowledge if it believed that defendant was the driver. Counsel's course of action was a reasonable exercise of trial strategy. Further, defendant has not demonstrated that, but for the alleged errors of counsel, there is a reasonable probability that the outcome of his trial would have been different.

Affirmed.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro